wanting "seaweeds (*tengusa*)" in the inspection certificate.

It is quite clear that the plaintiffs were not prepared to take the risk of negotiating the letter of credit without a letter of indemnity. They would have been perfectly justified in refusing to negotiate the draft which was in fact presented, for the reasons I have stated. However they asked for an indemnity and got it, whereas in *Rayner's* case, the bank asked for a guarantee against loss but Rayner & Co., Ltd. refused to give them one.

As MacKinnon L.J. in *Rayner's* case said, in the concluding part of his judgment, if the risk was negligible Rayner & Co., Ltd. would have readily given the required guarantee. Hambros Bank could not be called upon to take the risk and Rayner & Co., Ltd. could not insist that Hambros Bank should take the risk. In the present case, the defendant indemnified the plaintiffs against their taking that risk. I do not think that I need concern myself with deciding whether he gave that indemnity because he thought the risk was negligible or whether he gave that indemnity because he was anxious to lay his hands on a large amount of cash in what was his first transaction with a foreign firm in connection with seaweeds. If it is considered that any decision is necessary, I would hold that he knew perfectly well that the risk was not, in the least, negligible. He could only have been anxious to lay his hands on ready cash. In accordance with my findings of fact, earlier in this judgment as to the defendant's conduct in relation to this transaction, I am satisfied that he knew exactly what he was doing. There seems to be no justification for his cavalier treatment of P.W.1, Mr. Tsan Wai Keaw, of the Overseas Union Bank. Having given this indemnity to the plaintiffs, he was bound to reimburse them for their actual loss.

A considerable amount of argument was directed towards the question whether the plaintiffs were legally compellable to repay the issuing bank. Having regard to my findings as to the inadequacy of the documents presented, it follows that they were in fact so compellable. As agents of the issuing bank they were bound to make repayment because they had innocently misrepresented to the latter that the documents were in order. Acting on this assurance, the issuing bank credited the plaintiffs with the required amount which they would not have done had they been aware of the true facts. As soon as they received the documents they repudiated the credit. There was therefore no question of waiver or ratification on the part of the issuing bank. As I have said before, neither the issuing bank nor the confirming bank is concerned with disputes between the seller and the buyers.

In case any doubt exists as to the correctness of my conclusion as to the right of the plaintiffs to be indemnified against the actual loss incurred by them I would refer to the following passages from *Halsbury's* Laws of England 3rd Edition, Volume 18 at page 536 et. seq. —

"At law an action on the contract of indemnity normally does not lie until the promisee has been actually damnified by paying the third party's claim. When however, he has so paid it, the amount paid constitutes a debt due to him from the promisor which he may recover in an action, with interest, apart from certain exceptional cases in which circumstances exist preventing the exercise of his full rights. The right to indemnity, however, may arise under a special contract, on the true construction of which the right may be enforced, even at law, before actual loss has been sustained. In general, time runs against the right of the person indemnified to bring an action upon the contract of indemnity from the date when he is actually damnified by being called upon to pay and not from the date when the event occurs which gives rise to his liability to pay.

In equity, the rules of which now prevail in all courts, even in the absence of a special agreement, the person entitled to the indemnity may, obtain relief as soon as his liability to the third party has arisen, and before he has actually suffered loss. He may, therefore, in an appropriate case obtain an order compelling the promisor to set aside a fund out of which the liability may be met, or to pay the amount due directly to the third party, or even, when the promisor is under no liability to the third party, as is the case in contracts of mere indemnity, to the promisee himself. The party indemnified is not precluded from obtaining relief by the fact that his liability to the third party cannot be effectively enforced against him."

It would appear from the above that the law is strongly in favour of the plaintiffs and in fact, as Mr. Grimberg submitted, goes further than what they ask for. The plaintiffs are, in my view, entitled to damages in the amount of their actual loss, with interest. Judgment will therefore be entered for them as claimed with costs.

Claim allowed.

Solicitors: *Drew & Napier*; *L. A. J. Smith.*

LEE HWA LIANG v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong J.) April 1, 1964]

[K.L. — Criminal Appeal No. 11 of 1964]

Gaming—Sale of "tikam" board by shop-keeper—Whether "assisting" in carrying on a public lottery—Common Gaming Houses Ordinance, 1953, ss. 4(1)(c) and 8(1).

Public Lottery—Sale of "tikam" board by shop-keeper—Whether promoting a public lottery.

The appellant, a shop-keeper, displayed about 200 "tikam" boards in his shop for sale. He sold one of these to a police inspector and on the same day his shop was searched by a police party under a search warrant and he was arrested and his stock of "tikam" boards taken possession of by the police.

He was subsequently charged and convicted for assisting in carrying on a public lottery under section 4(1)(c) of the Common Gaming Houses Ordinance and the "tikam" boards confiscated. On appeal,

Held: (1) the word "assist" in section 4(1)(c) of the Common Gaming Houses Ordinance should be distinguished from the word "abet" in section 107 of the Penal Code and the words "instigates, promotes or facilitates" found in section 8(1) of the Common Gaming Houses Ordinance. The demarcation line between assisting and not assisting is to be found in the nexus, or absence thereof, between the party alleged to be assisting and the party carrying on the lottery;

(2) a vendor who sells a "tikam" board to a purchaser cannot be said to be assisting the purchaser in carrying on a public lottery merely by reason of the sale. Further participation of the vendor in the purchaser's activities is a necessary ingredient of the offence;

(3) as the intention of the appellant was to sell the article and not to assist in, promote or instigate the commission of an offence, there was no *mens rea*.

Case referred to:—

(1) *Public Prosecutor* v. *Seow Boon Hooi* [1963] M.L.J. 29.

CRIMINAL APPEAL.

Yong Pung-How for the appellant.

Gunn Chit Tuan (Deputy Public Prosecutor) for the respondent.

Ong J.: The appellant was tried in the Magistrate's Court at Kuala Lumpur on the following charges, in the alternative:

(a) "That you on 20.8.63 at about 6.00 p.m. at No. 23 Foch Avenue, Kuala Lumpur, in the State of Selangor, did assist in carrying on a public lottery to wit, "Tikam Tikam" and that you have thereby committed an offence punishable under section 4(1)(c) of the Common Gaming Houses Ordinance No. 26 of 1953."

(b) "That you at the same time, date and place did promote a public lottery to wit, "Tikam Tikam" without being in possession of a valid permit and that you have thereby committed an offence punishable under section 10(1) of the Lotteries Ordinance No. 86 of 1952."

He was convicted on the principal charge and sentenced to a fine of $500, in default 3 months' imprisonment, and the exhibits were ordered to be confiscated. He appealed against his conviction and sentence. On March 25, 1964 I allowed the appeal and quashed the conviction and sentence and the order of confiscation. I then intimated that I would give the grounds of my decision later, and now proceed to do so.

The appellant is the proprietor of a shop at No. 23 Foch Avenue, Kuala Lumpur, which displayed for sale about 200 "tikam" boards. At 4 p.m. on August 20, 1963 a police inspector (P.W.1.) purchased one of these boards for $6.30. Half-an-hour later a police party led by P.W.2 entered the premises on a search warrant and took possession of 205 boards therein. P.W.4 gave evidence that on the board purchased by P.W.1 there were 193 tickets but only 48 prizes. Presumably the other boards seized were similar. Expert evidence was given by Inspector Mitchel (P.W.5) that each "tikam" board came squarely within the definition of a "lottery" in section 2(1) of the Common Gaming Houses Ordinance, 1953. The above is a summary of the evidence for the prosecution. The defence elected to offer no evidence.

It has been conceded by counsel for the appellant, quite rightly, that every "tikam" board constituted a complete outfit for a lottery. Each board, in fact, is a distinct lottery by itself.

The question is whether the appellant had committed the offence of "assisting in carrying on a public lottery" by the mere fact of selling one board to the police inspector. Both the learned Deputy Public Prosecutor and counsel for the appellant had been no more successful than myself in the search for authorities that could be of assistance. I must therefore fall back on the interpretation of the words "assisting" and "carrying on" in section 4(1)(c).

The ordinary meaning of "assist" is "to aid or help". "Carrying on a public lottery" is self-explanatory. It is to be observed that the word "assist" is used rather than the technical term "abet", which has the wider meaning in section 107 of the Penal Code. "Assists" in section 4(1)(c) is again to be distinguished from "instigates, promotes or facilitates the commission of an offence" which are found in section 8(1). For the offence of "assisting in carrying on a public lottery", the legislature could very well have substituted the words "instigating, promoting or facilitating the carrying on of a public lottery", if that was the intention. I think it is right, therefore, to distinguish "assisting" from "instigating, promoting or facilitating" since penal statutes must be construed strictly.

Now, when an article is sold and delivered the vendor parts absolutely with both the possession and the property in that thing to the purchaser. A valet may correctly be described as assisting his master in dressing. But can the tailor who supplied his customer a suit of clothes be said to perform the same function as the valet? Can a motor-car firm which sold a vehicle to a medical practitioner be said to be assisting him in carrying on his profession? Does the firm which sold a motor-lorry to a haulier assist him in carrying on his business? When A sells his business as a going concern to B can he be said, after the sale, to be assisting B in carrying on the business? Coming closer to a parallel instance, are Robinson's liable to prosecution whenever they sell a roulette outfit, which undeniably is as much a lottery as a "tikam" board? In every such case — and the examples can be multiplied — the answer must clearly be in the negative.

In my opinion the demarcation line between assisting and not assisting is to be found in the nexus, or absence thereof, between the party alleged to be assisting and the party carrying on a lottery. Common sense provides the answer. The vendor of any game or device capable of

being used for a public lottery cannot in my view, be said to assist the purchaser in carrying on such lottery merely by reason of the sale. Further participation of the vendor in the purchaser's activities is a necessary ingredient of the offence. This is because they had no further connection one with the other after sale and delivery. One purchaser might keep the outfit he purchased without using it. Another might innocently use it for a children's party without committing any offence, as envisaged by Suffian J. in *Public Prosecutor* v. *Seow Boon Hooi.*[1] It cannot be assumed that every purchaser must necessarily use it for the purpose of a public lottery, and in the instant case, there is no evidence whatsoever that any lottery had been carried on or contemplated by the only person who had bought a board from the appellant. Even assuming that P.W.1 did carry on a lottery, the facts of this case are sufficiently clear that the appellant lifted not a finger to assist P.W.1 in committing the offence. The decision rested with P.W.1 alone — or any other customer of the appellant's whether or not to carry on a lottery with the board he owned. If the customer chooses not to do so, there can never be a lottery carried on, and therefore the appellant cannot be said to be assisting in something non-existent.

Furthermore, the necessary *mens rea* was absent, because the true intention of the appellant — to be gathered from the circumstances — was to sell an article, not to assist in, promote or instigate the commission of an offence against the Ordinance.

I need not advert to the alternative charge because there was no evidence of any lottery carried on or even contemplated.

For the above reasons, I allowed the appeal and quashed the conviction and sentence and ordered the 205 boards seized to be returned to the appellant.

I would add, in conclusion, that if there is a *lacuna* in the law, and it is deemed desirable in the public interest to make it an offence to place such devices as a "tikam" board at the disposal of those who might use it for illegal purposes, then that *lacuna* can only be filled by the legislature.

Appeal allowed.

Solicitors: *Shook Lin & Bok.*

KAMPONG KUANTAN RUBBER CO. LTD. v. V.K.G. MENON

[O.C.J. (Ong J.) April 2, 1964]

[K.L. — Civil Suit No. 634 of 1963]

Practice and Procedure—Defendant resident abroad —Order for issue of writ of summons on defendant for service outside jurisdiction—Further order for substituted service on solicitor resident within jurisdiction—Service of writ and not notice of writ under order for substituted service—Whether service valid—R.S.C. 1957 O. 11 rr. 3A, 6, First Schedule 4 and Form 6.

In this case the plaintiff claimed the sum of $31,102.66 from the defendant a former employee of the plaintiff. The defendant was resident in India and the plaintiff applied for and obtained on September 19, 1963 an order under Order 11 r. 3A that (a) it be at liberty to issue a writ of summons against the defendant (b) it be granted leave to issue a writ of summons against the defendant for service outside the jurisdiction in India and (c) time for appearance to the said writ by the defendant be within 31 days after the "service of the said writ or notice in lieu thereof". Pursuant to the said order the writ (in Form 4) was issued on September 23, 1963. No notice of writ to be served out of jurisdiction (as in Form 6) was issued. Subsequently on November 11, 1963 the plaintiff obtained a further order "that the writ of summons or the notice of writ to be served out of jurisdiction be served on Mr. Athi Nahappan (a solicitor)....and that such service be deemed good and sufficient service on the defendant...."

Service of the Form 4 writ was effected on Mr. Athi Nahappan on December 13, 1963 and on January 2, 1964 he entered conditional appearance for the defendant without prejudice to an application to set aside the writ and service thereof. On January 11, 1964 notice of motion was filed to set aside the writ or service of the writ on the grounds that (1) the order of September 19, 1963 was not an order for service and the writ had in fact been issued before an order for service had been obtained and (2) the notice and not the writ should have been served.

Held: (1) the order of September 19, 1963 though not drawn in unequivocal terms was an order for service of the writ itself (and not the notice of the writ) but the error was cured by providing for service of "the said writ of notice in lieu thereof" at the end of the order. There was at most an unfortunate terminological slip which was a curable irregularity and as the writ was issued on September 23, 1963 it was issued after the order;

(2) substituted service of the writ on Mr. Athi Nahappan was a nullity and therefore the service on him must be set aside.

Cases referred to:—

(1) *Hewitson* v. *Fabre* (1888) 21 Q.B.D. 6, 9.

(2) *Fry* v. *Moore* (1889) 23 Q.B.D. 395, 399.

(3) *Field* v. *Bennett* 56 L.J. (Q.B.) 89.

(4) *Hillyard* v. *Smyth* 36 W.R. 7.

(5) *Wilding* v. *Bean* [1891] 1 Q.B. 100.

APPLICATION.

S. D. K. Peddie for the plaintiff.

V. K. Palasundaram for the defendant.

Ong J.: The plaintiff claims from the defendant, its former chief clerk, the sum of $31,102.66 alleged to have been overdrawn by him while in the service of the plaintiff. The defendant, an Indian who is neither a citizen of the Federation nor a subject of the Ruler of any State, now resides in India, at an address unknown to anybody but his solicitor Mr. Athi Nahappan.

Under R.S.C. Order 11, rule 6, notice of the writ, and not the writ itself, has to be served, and, in the circumstances, it was thought by the